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IN THE

Supreme Court of the United States

October Term 1940
No. 756.

MARGARET B. CARPENTER and LEROY E. CARPENTER,
Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Preliminary Statement.

Respondent views the institution of the present proceeding as a wholly unwarrantable abuse of the processes of this Court. In *Carpenter v. Hamilton,* October Term, 1940, No. 93, petitioners urged upon this Court precisely the same arguments which are again offered in support of the present petition. The petition in No. 93 was denied by this Court on October 21, 1940, without opinion.

Prior to filing their petition in No. 93 petitioners had availed themselves of the remedy of appeal to the Supreme Court of California, and that appeal had resulted in an affirmance of the judgment of which petitioners complain. *After* this Court had denied their petition in No. 93 petitioners filed in the Supreme Court of California a petition for writ of review. In the latter petition the Supreme Court of California was asked again to review the very same judgment which it previously had reviewed and affirmed on petitioners' appeal. The Court refused to entertain the proceeding, denying the petition without opinion.

Under California practice, as we shall show, it is well settled that the writ of review does not lie in any case where the judgment or order complained of is reviewable on appeal. On its face, therefore, the petition for writ of review was a sham and a pretense. Quite obviously it was filed only in an attempt to lend color to a false claim that a federal question had been appropriately raised in the California courts and in the hope of creating a deceptive illusion of foundation for the present petition in this Court.

II.

Jurisdiction.

(1) No Federal Question Properly Raised in the State Courts.

Petitioners cannot, and do not, assert that any federal question was ever raised or suggested by them in the California courts otherwise than by the filing of said petition for writ of review. During the trial of the case in the Superior Court "due process" was not so much as mentioned. There was not the slightest hint or intimation that the existence of a federal question was claimed. Likewise, in the briefs filed in the Supreme Court of California on the appeal there was not the remotest suggestion of a federal question. After the affirmance of the judgment by the Supreme Court of California petitioners filed a petition for a rehearing, but even then there was no claim or suggestion of a federal question. Never, until the petition for a writ of review was filed, did petitioners assert the existence of a federal question in a California court.

(2) The Writ of Review Did Not Lie.

It is too clear to admit of reasonable argument that the judgment of which petitioners complain could not be reviewed by the Supreme Court of California on petition for writ of review. It was reviewable upon appeal, and in no other way. It *had* been thus reviewed and affirmed upon petitioners' own appeal. Section 1068 of the Code of Civil Procedure of the State of California is the con-

trolling statutory provision which determines the circumstances under which the writ of review (certiorari) may be granted. Said section provides as follows:

> *"When and by what courts granted.* A writ of review may be granted by any court, except a municipal, police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, *and there is no appeal,* nor, in the judgment of the court, any plain, speedy, and adequate remedy." (Italics supplied.)

Innumerable times the Supreme Court of California has held that the above-quoted statutory provision means precisely what it says, namely, that the writ of review may not be granted to review an appealable order or judgment. Moreover, this rule is equally applicable in cases where it is asserted that the order or judgment complained of was without the jurisdiction of the court making it. The following are only a few of the vast number of decisions so holding:

Coan v. Superior Court, 14 Cal. (2d) 591, 95 Pac. (2d) 931;

Ivory v. Superior Court, 12 Cal. (2d) 455, 85 Pac. (2d) 894;

State Board of Equalization v. Superior Court, 9 Cal. (2d) 252, 70 Pac. (2d) 482;

Christie v. Superior Court, 218 Cal. 423, 23 Pac. (2d) 757;

Hildebrand v. Superior Court, 173 Cal. 86, 159 Pac. 147;

Anglo Californian Bank v. Superior Court, 153 Cal. 753, 96 Pac. 803.

In *Ivory v. Superior Court, supra,* the California Supreme Court stated the law as follows:

> "It is the general rule that 'where the law allows an appeal from an order or judgment, even when the tribunal making such order or rendering such judgment exceeded its authority in so doing, a writ of review may not be granted'." (Citing Code of Civil Procedure, Section 1068, and many cases.)

In *Stoddard v. Superior Court,* 108 Cal. 303, 41 Pac. 278, the California court said:

> "It may be readily admitted that the court had no jurisdiction to make the order; but, as the order is appealable, certiorari will not lie, because it lies only where 'there is no appeal.' (Code Civ. Proc., Sec. 1068.) * * * In *Stuttmeister v. Superior Court,* 71 Cal. 322, the authorities on the point are colated; and it was there declared that 'the writ (certiorari) will not lie when there is an appeal from the action complained of,' and 'the writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction *for which an appeal does not lie.*' (See cases cited in opinion of Searls, C., also *In re McConnell,* 74 Cal. 217, 219; Hayne on New Trial and Appeal, Sec. 307.) We have been referred to no case in which it has been held that, under our code, a writ of certiorari will lie to reverse an appealable order."

Petitioners assert that the history of the present litigation "is not unlike" that involved in *Herndon v. Georgia,* 295 U. S. 441, and *Herndon v. Lowry,* 301 U. S. 242. The falsity of the assertion is apparent. In the *Herndon* case the Georgia courts considered and specifically disposed of the federal questions which were raised in the

habeas corpus proceeding. It is to be assumed, and this Court *did* assume in *Herndon v. Lowry*, that the *habeas corpus* proceeding, under the state law, was a proper proceeding in which the issues of federal constitutional right were appropriately raised. This Court, speaking through Mr. Justice Roberts, made the following observation in this connection:

> "In the present proceeding the Superior Court and Supreme Court of Georgia have considered and disposed of the contentions based upon the federal Constitution. The scope of a *habeas corpus* proceeding in the circumstances disclosed is a state and not a federal question and since the state courts treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction and all such issues are open here."

In the *Herndon* case the Superior Court and the Supreme Court of Georgia not only entertained the *habeas corpus* proceeding, but they considered and disposed of the contentions based upon the federal Constitution. In the present case, on the contrary, it is abundantly clear that the writ of review did not lie. The California Supreme Court *refused* to entertain the proceeding, and *declined* to consider or pass upon the federal question, or any other question. It is clear that the California Supreme Court had no jurisdiction to entertain the proceeding. When petitioners had exercised their right of appeal and when their petition for a rehearing had been denied by the California Supreme Court they had exhausted the last remedy available under the law of California.

III.

Summary Statement of Reasons Requiring Denial of Petition.

(1) THE ATTEMPTED PROCEEDING IN THE STATE COURT IN WHICH PETITIONERS SOUGHT THE WRIT OF REVIEW WAS WITHOUT JURISDICTION, AND CONSTITUTED AN ATTEMPT TO INVOKE A REMEDY NOT AVAILABLE TO PETITIONERS UNDER CALIFORNIA PRACTICE.

Code of Civil Procedure, State of California, Sec. 1068;

Coan v. Superior Court, 14 Cal. (2d) 591, 95 Pac. (2d) 931;

Ivory v. Superior Court, 12 Cal. (2d) 455, 85 Pac. (2d) 894;

State Board of Equalization v. Superior Court, 9 Cal. (2d) 252, 70 Pac. (2d) 482;

Christie v. Superior Court, 218 Cal. 423, 23 Pac. (2d) 757;

Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278.

(2) NO FEDERAL QUESTION WAS EVER PROPERLY RAISED, CLAIMED, PRESENTED OR ARGUED, EITHER IN THE TRIAL COURT OR IN THE SUPREME COURT OF CALIFORNIA.

New York Central etc. R. R. Co. v. City of New York, 186 U. S. 269, 46 L. Ed. 1158;

Mutual Life Ins. Co. of New York v. McGrew, 188 U. S. 291, 47 L. Ed. 480;

Chicago etc. Ry. Co. v. McGuire, 196 U. S. 128, 49 L. Ed. 413;

Missouri Pacific Ry. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235;

Chandler v. Manifold, 290 U. S. 665, 78 L. Ed. 575.

(3) NEITHER THE SUPERIOR COURT NOR THE SUPREME COURT OF CALIFORNIA WAS EVER CALLED UPON TO CONSIDER OR PASS UPON ANY QUESTION OF FEDERAL CONSTITUTIONAL RIGHT, SINCE PETITIONERS' ONLY ATTEMPT TO RAISE A FEDERAL QUESTION WAS BY WAY OF A PETITION WHICH DID NOT LIE UNDER CALIFORNIA PRACTICE.

See cases cited under (1) and (2), *supra.*

(4) NO FEDERAL QUESTION IS PRESENTED BECAUSE THE APPLICATION OF THE DOCTRINE OF RES JUDICATA IS PURELY A MATTER OF LOCAL LAW.

Northern Pacific R. R. Co. v. Ellis, 144 U. S. 458, 464, 36 L. Ed. 504;

Haley v. Breeze, 144 U. S. 130, 131, 132, 36 L. Ed. 373;

San Francisco v. Itsell, 133 U. S. 65, 33 L. Ed. 570;

Adams v. Louisiana Board of Liquidation, 144 U. S. 651, 36 L. Ed. 578;

Beals v. Cone, 188 U. S. 184, 47 L. Ed. 435;

Western Electrical Supply Co. v. Abbeville Electric Light & Power Co., 197 U. S. 299, 49 L. Ed. 765;

King v. West Virginia, 216 U. S. 92, 54 L. Ed. 396;

Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215.

(5) THE QUESTION PRESENTED IS UNSUBSTANTIAL AND FRIVOLOUS.

Consolidated Turn Pike Co. v. Norfolk & Ocean View Ry. Co., 228 U. S. 596, 57 L. Ed. 982;

Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 59 L. Ed. 777;

Equitable Life Assurance Society v. Brown, 187 U. S. 308, 47 L. Ed. 190.

(6) THE CASE PRESENTED IS NOT ONE INVOLVING A MATTER OF SUCH PUBLIC OR GENERAL IMPORTANCE AS TO WARRANT GRANTING THE DISCRETIONARY WRIT.

Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 67 L. Ed. 712.

IV.
Argument.

(1) THE CLAIM OF ERROR ASSERTED BY PETITIONERS IS UNSUBSTANTIAL AND UNMERITORIOUS IN THAT: (A) THE APPLICATION OF THE DOCTRINE OF RES JUDICATA IS EXCLUSIVELY A MATTER OF LOCAL LAW, AND (B) PETITIONERS' OWN STATEMENT OF THE CASE DISCLOSES THAT NO DENIAL OF DUE PROCESS WAS INVOLVED IN ANY OF THE PROCEEDINGS OR RULINGS OF THE CALIFORNIA COURTS.

The decisions of this Court, cited *supra*, demonstrate that the application of the doctrine of *res judicata* is a matter of purely local law. Clearly, the application of the local law was independently sufficient to sustain the judgment. In *San Francisco v. Itsell*, 133 U. S. 65, this Court, speaking through Mr. Justice Gray, used the following language with reference to a judgment of the Supreme Court of California:

> "In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in nowise depending upon the Constitution, treaties or statutes of the United States. *Chouteau v. Gibson*, 111 U. S. 200 (28:400).
>
> *Writ of error dismissed for want of jurisdiction.*"

Likewise, in the instant case, the record shows that the sole question involved was whether or not petitioners were estopped by the judgment in the former action from

asserting that Hamilton was guilty of fraudulent misrepresentations. It must be quite apparent that the California courts decided this question correctly, because it is established by the decisions, to which the California Supreme Court referred, that the essential elements of actionable fraud are precisely the same both in law and in equity. Furthermore, said California decisions establish the proposition that a final judgment upon the merits is forever conclusive upon the parties with respect to every material issue of *fact* tendered in the litigation in which the judgment was rendered. (*Todhunter v. Smith*, 219 Cal. 690, 28 Pac. (2d) 916.) Therefore, the California Supreme Court correctly said that there was no place for the application of the maxim that "he who comes into equity must come with clean hands."

Petitioners seek to make it appear that they were "robbed" by the California courts of the "right to a hearing" upon their allegations that they were defrauded. Nothing could be more untrue. Petitioners, themselves, instituted the original action, in which they sought to recover damages by reason of the alleged fraud. That action was regularly tried. It terminated in a judgment adverse to petitioners. (*Carpenter v. Hamilton*, 18 Cal. App. (2d) 69, 62 Pac. (2d) 1397.) The necessary effect of the judgment in the fraud case was a conclusive determination that no fraud had been practiced upon the petitioners.

Actually, petitioners' complaint is that they were not permitted to have two separate trials upon their claim that they were defrauded. Their position is that they should have been permitted to retry the fraud issues in the foreclosure case, exactly as though the fraud case had never been tried or decided. Such procedure, we submit,

would not be countenanced anywhere. Unless judgments are, at some point, accorded the attribute of finality litigation must necessarily remain interminable.

Clearly, the ruling of the Superior Court in the foreclosure case, and the decision of the Supreme Court sustaining that ruling, were correct applications of the doctrine of *res judicata*. Not only was the ruling in accord with well-established California law, but it harmonizes with the salutary doctrine of *res judicata* as this principle of law is almost universally understood and applied. The text writer in 2 *Freeman on Judgments*, 5th edition, page 1443, states the law as follows:

> "By the rules of the civil as well as of the common law, '*res judicata* is not changed by a change in the form of action.' It is not material that the form of action be the same, if the merits were tried in the first. A party cannot, by varying the form of action or adopting a different method of presenting his case, escape the operation of the principle that one and the same cause of action shall not be twice litigated. Where either of two remedies is equally available to vindicate the same right, the judgment in an action employing one of them will bar a resort to the other."

It is elementary that a final judgment on the merits concludes every issue of law and fact tendered in the action as between the parties thereto. One of the issues of fact tendered in *Carpenter v. Hamilton* was whether or not Hamilton made the misrepresentations as alleged. The necessary effect of the final judgment in Hamilton's favor was a determination that he did not make them. When that judgment became final the Carpenters were forever estopped from asserting that Hamilton was guilty of misrepresentation.

V.

Conclusion.

Respondent feels that the lack of merit in the present petition is so obvious as to render superfluous any extended argument. We do not believe that counsel for petitioners can, with candor or in good faith, represent to this Honorable Court that the writ of review sought in the Supreme Court of California was a remedy available to petitioners under California law. Yet denial of said writ is the asserted basis for the petition herein.

The record here, obviously insufficient though it is, does reveal that the novel idea that a federal question might be claimed was not conceived in the minds of petitioners' counsel until after every remedy known to California law had been completely exhausted by them.

Quite aside from the clear absence of elementary jurisdictional requirements, the contentions sought to be presented by petitioners, we submit, are patently unsubstantial and frivolous.

Respectfully submitted,

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Due service of the within Brief is hereby acknowledged this.....day of March, A. D. 1941.

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